

RONALD A. PETERS, Bar No. 169895
BENJAMIN A. EMMERT, Bar No. 212157
LITTLER MENDELSON
A Professional Corporation
50 West San Fernando Street
15th Floor
San Jose, CA 95113.2303
Telephone: 408.998.4150

Attorneys for Defendants
AC SQUARE, INC., AFSHIN GHANEH,
ANDREW BAHMANYAR

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DANIEL KEATING-TRAYNOR on
behalf of himself and all others similarly
situated,

Plaintiff,

v.

AC SQUARE, INC.; COMCAST INC.;
AFSHIN GHANEH; ANDREW
BAHMANYAR; and DOES 1 THROUGH
60, inclusive,

Defendant.

Case No. CV-08-3035-MHP

**[CALIFORNIA ACTION NO. CIV 464144
(CONSOLIDATED BY ORDER OF
COURT WITH CIV 473571)]**

**JOINT SUPPLEMENTAL REQUEST FOR
JUDICIAL NOTICE FILED IN SUPPORT
OF NOTICE OF MOTION AND MOTION
TO DISMISS PLAINTIFF'S FIRST,
SECOND, THIRD, FOURTH, AND FIFTH
CAUSES OF ACTION FROM
COMPLAINT, CASE NUMBER CV-08-
3035-MHP**

Date: September 15, 2008

Time: 2:00 p.m.

Dept: Courtroom 15

Judge: Honorable Marilyn H. Patel

Defendants AC Square, Inc., Afshin Ghaneh and Andrew Bahmanyar (hereafter collectively referred to as "Defendants") submit the following Request for Judicial Notice in support of Defendants' Motion to Dismiss Plaintiff's first, second, third, fourth and fifth causes of action from the Complaint, Case Number CV-08-3035-MHP, pursuant to Federal Rule of Evidence section 201.

REQUEST FOR JUDICIAL NOTICE NO. 1:

Defendant requests this Court take judicial notice of Defendant AC Square, Inc.'s

1 Notice of Demurrer to Plaintiffs' Fourth Amended Complaint and Notice of Motion to Strike
 2 Portions of Said Complaint filed in the Superior Court in and for the County of San Mateo, Case
 3 Number CIV 464144, on July 30, 2007. A true and correct copy of this document is attached hereto
 4 as Exhibit A.

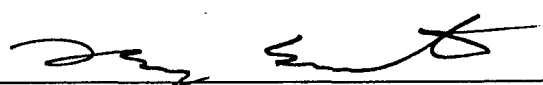
5 **REQUEST FOR JUDICIAL NOTICE NO. 2:**

6 Defendant requests this Court take judicial notice of Plaintiff's First Amended
 7 Complaint for Restitution, Damages and Injunctive Relief filed in the Superior Court in and for the
 8 County of San Mateo, Case Number CIV 464144, on August 31, 2007. A true and correct copy of
 9 this document is attached hereto as Exhibit B.

10 **REQUEST FOR JUDICIAL NOTICE NO. 3:**

11 Defendant requests this Court take judicial notice of the Answer of Defendant AC
 12 Square to Plaintiff's Unverified First Amended Complaint filed in the Superior Court in and for the
 13 County of San Mateo, Case Number CIV 464144 on December 5, 2007. A true and correct copy of
 14 this document is attached hereto as Exhibit C.

15 Dated: August 18, 2008

16 
 17 RONALD A. PETERS
 18 BENJAMIN EMMERT
 19 LITTLER MENDELSON
 20 A Professional Corporation
 Attorneys for Defendants
 AC SQUARE, INC., AFSHIN GHANEH,
 ANDREW BAHMANYAR

21
 22 Firmwide:86261404.1 047098.1008

07-30-07 02:41pm From-LITTLER MENDELSON

408 920 9753

T-918 P.003/030 F-882

ENDORSED FILED
SAN MATEO COUNTY

JUL 30 2007

Clerk of the Superior Court
BY ML MARLOWE
DEPUTY CLERK

1 RONALD A. PETERS, Bar No. 169895
 2 LITTLER MENDELSON
 3 A Professional Corporation
 4 50 West San Fernando Street
 5 14th Floor
 6 San Jose, CA 95113.2303
 7 Telephone: 408.998.4150
 8 Facsimile: 408.288.5686
 9 E-Mail: rpeters@littler.com

10 Attorneys for Defendant
 11 AC SQUARE, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

12 DANIEL KEATING-TRAYNOR, on
 13 behalf of himself and all others similarly
 14 situated,

Plaintiff,

v.

15 AC SQUARE, DOES 1 THROUGH 600,
 16 inclusive,

Defendant.

Case No. CIV 464144

DEFENDANT AC SQUARE INC.'S
 NOTICE OF DEMURRER TO
 PLAINTIFFS' FOURTH AMENDED
 COMPLAINT AND NOTICE OF MOTION
 TO STRIKE PORTIONS OF SAID
 COMPLAINT

DATE: Wednesday, September 5, 2007
 TIME: 9:00 a.m.
 DEPT.: Law and Motion
 TRIAL DATE: N/A
 JUDGE:

BY FAX

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendant AC Square, Inc.'s Demurrer to Plaintiffs' Fourth Cause of Action and its Motion to Strike Portions of said Complaint ("Demurrer and Motion to Strike"), has been set for hearing on September 5, 2007, in the Law and Motion Department of the Superior Court for the State of California, County of San Mateo, located at 400 County Center Redwood City, California, in the Law and Motion Department.

Defendant's Demurrer and Motion to Strike will be based upon this Notice of Demurrer and Motion to Strike, the Demurrer and Motion to Strike filed herewith, the Memorandum

LITTLER MENDELSON
 A Professional Corporation
 50 West San Fernando Street
 14th Floor
 San Jose, CA 95113-2303
 408.998.4150

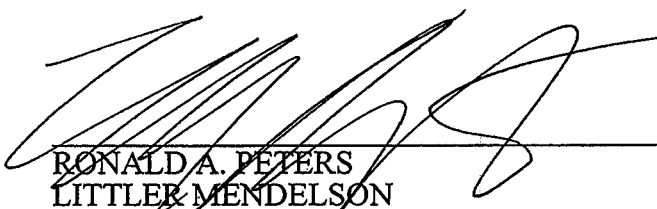
Notice of Demurrer and Motion to Strike

CIV 464144

11031063.tif - 7/30/2007 2:53:45 PM

1 of Points and Authorities in Support of Defendant's Demurrer and Motion to Strike filed herewith,
2 and the pleadings and papers on file in this action.

3 Dated: July 30, 2007

4
5
6 
7 RONALD A. PETERS
8 LITTLER MENDELSON
9 A Professional Corporation
10 Attorneys for Defendant
11 AC SQUARE, INC.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

9 Firmwide:82858305.1 047098.1008

EXHIBIT B

SEP 04 2007

Daniel Berko - SBN 94912
LAW OFFICE OF DANIEL BERKO
819 Eddy Street
San Francisco, CA 94109
Telephone: 415-771-6174
Facsimile: 415-474-3748
E-mail: BerkoLaw@SBCglobal.net

Attorneys for Plaintiffs,
DANIEL KEATING-TRAYNOR on behalf of himself
and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

UNLIMITED JURISDICTION

DANIEL KEATING-TRAYNOR on
behalf of himself and all others similarly
situated,

Plaintiffs,

vs.

AC SQUARE, DOES 1 THROUGH 600,
inclusive.

Defendants.

Case No.: CIV 464144

FIRST AMENDED COMPLAINT FOR
RESTITUTION, DAMAGES AND
INJUNCTIVE RELIEF

CLASS ACTION

Plaintiff DANIEL KEATING- TRAYNOR complains of Defendants and each of them as follows:

1. Plaintiff is informed and believes and thereupon alleges that Defendant AC SQUARE, INC. and Does 1 through 600 install, disconnect, and upgrade cable television and computer services to consumers who use the services and equipment of Comcast, a provider of cable television and computer services to consumers throughout California.

2. Plaintiff does not know the true names of Defendants DOES 1 through 600 inclusive, and therefore sues them by those fictitious names. Plaintiff is informed and believes, and on the basis of that information and belief alleges, that each of those defendants was in some

FIRST AMENDED COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

1 manner legally responsible for the events, happenings, injuries and damages alleged in this
2 complaint.

3 3. In this complaint, when reference is made to any act of AC SQUARE, INC.
4 (hereafter "AC") such allegations shall mean that the owners, officers, directors, agents,
5 employees or representatives, of AC authorized, ratified, approved such acts, or negligently
6 failed and omitted to supervise its employees and agents while engaged in the management,
7 direction, operation or control of the affairs of the business organization and did so while
8 acting within the course and scope of its employment or agency.

9 4. Plaintiff brings this action on his own behalf, and on behalf of all persons similarly
10 situated. The class plaintiff represents consists of all persons who were employed by AC as
11 cable television and computer technicians and who install, upgrade, disconnect and provide
12 similar services to consumers who use the services and equipment of Comcast. Plaintiff
13 KEATING worked as a technician and his job included the responsibilities to install, upgrade,
14 disconnect and provide similar services to consumers who use the services and equipment of
15 Comcast. Plaintiff was formerly employed by AC as a cable television and computer technician
16 for the purpose of installing, upgrading, disconnecting and providing similar services to
17 consumers who use the services and equipment of Comcast

18 5. There are well-defined common of questions of law and fact affecting the class
19 Plaintiffs represent. The class members' claims against Defendants involve questions of common
20 and general interest in that each and every class member worked as an installer of cable
21 television and computer services to consumers who use the services and equipment of Comcast,
22 were not paid for overtime, were paid on a piecemeal basis, did not receive rest breaks and meal
23 breaks as required by California law, had the cost of tolls and other items deducted from their
24 wages, were not reimbursed for gas, cellphone bills, parking tickets or vehicle maintenance or
25 damage all of which involved or occurred while working for AC. In addition, AC failed to pay
26 each class member wages during all hours that they worked. Accordingly, the facts supporting
27 the claim for each class member is identical or substantially similar for Plaintiff and each
28 member of the class and the alleged breach and claim of liability is identical or substantially

FIRST AMENDED COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

1 identical for each member of the class. These questions are such that proof of a state of facts
2 common to the class representatives and to members of the class will entitle each member of the
3 class to the relief requested in this complaint.

4 6. Plaintiff will fairly and adequately represent the interests of the class, because
5 plaintiff is a member of the class and plaintiff's claims are typical of those in the class.

6 **FIRST CAUSE OF ACTION**

7 **(VIOLATION OF BUSINESS AND PROFESSIONS CODE §17200)**

8 7. Plaintiff incorporates herein *in haec verba* all of the allegations, averments, and
9 matters contained in paragraphs 1 through 6 above.

10 8. Business and Professions Code §17200 et seq. prohibits any business from
11 engaging in unfair competition which it defines as any unlawful, unfair or fraudulent business act
12 or practice and unfair, deceptive, untrue or misleading advertising including any act prohibited by
13 Business and Professions Code §17500.

14 9. AC'S refusal to pay class members the wages due to them, improper deductions from
15 class members' paychecks, and its refusal to pay overtime due are each separately and
16 collectively unfair and unlawful business practices.

17 10. Each class member is entitled to restitution of all money in which they have an
18 ownership interest which constitutes either (1) the failure to pay wages due or (2) the failure to
19 pay overtime due or (3) the failure to pay for time spent while employed by AC.

20 11. Plaintiff and the class are entitled to an Order or Injunction, prohibiting Defendant from
21 continuing to engage in the conduct alleged here.

22 **SECOND CAUSE OF ACTION**

23 **(VIOLATION OF LABOR CODE 2802)**

24 12. Plaintiff incorporates by reference all of the allegations, averments and matters
25

contained in paragraph 1 through 6 inclusive as if set forth at length herein *in haec verba*.

13. While employed in the customary business of AC and in the direct consequence of their duties, class members were required to expend his or her own monies in direct consequence of the discharge of his or her duties, and in addition suffered losses to his or her own property for which Defendants must indemnify class members, including, but not limited to the purchase of a vehicle, vehicle maintenance, gas, tools, and equipment, including safety belts and other equipment.

THIRD CAUSE OF ACTION
(FAILURE TO PAY OVERTIME WAGES)

14. Plaintiff incorporates by reference all of the allegations, averments and matters contained in paragraph 1 through 6 inclusive as if set forth at length herein *in haec verba*.

15. AC fails and refuses to pay class members overtime for time worked in excess of eight hours per day or forty hours per week.

16. Labor Code 1198 provides that it is unlawful to employ persons for longer than the hours set by the Industrial Welfare Commission or under conditions prohibited by the applicable wage order.

17. At all times relevant herein, the Industrial Welfare Commission Wage Order No. 9-2001 (8 Cal. Code Reg. 11090) and Labor Code 510(a) applied to the employment of class members by Defendant. Said wage order and Labor Code section provide that any employee employed for more than 8 hours a day or 40 hours per week are to be paid at the rate on 1.5 times the normal hourly rate for hours in excess of 8 per day or 40 per week, and or double time under certain conditions.

18. Pursuant to Labor Code 1194(a), Plaintiffs are entitled to reasonable attorney's fees and costs.

FIRST AMENDED COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

19. Pursuant to Labor Code 558(a)(1), each class member is entitled to a civil penalty of \$50 for the initial work period that each class member was underpaid and \$100 for each successive period pay period that he or she was not paid overtime wages as required by law.

FOURTH CAUSE OF ACTION
(FAILURE TO FURNISH INFORMATION REQUIRED BY LABOR CODE 226)
(ON BEHALF OF THE CLASS)

20. Plaintiff incorporates by reference all of the allegations, averments and matters contained in paragraph 1 through 6 inclusive as if set forth at length herein *in haec verba*.

21. This cause of action is brought by Plaintiff solely in his capacity as a representative of the class. Many of the class members have worked for Defendant within one year of the filing of this complaint.

22. Defendant has willfully refused to semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, and (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one

23. Each class member is entitled to a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

24. Defendant has, and if not enjoined may continue to (or resume) refuse and fail to comply with Labor Code 226(a). Further, Defendant does not provide former or current employees with

FIRST AMENDED COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

the right to inspect or copy records pertaining to the former or current employee upon reasonable notice to the employer. Plaintiff, on behalf of himself and separately as a representative on behalf of the class, seeks an injunction preventing Defendant from violating Labor Code 226 in the future.

FIFTH CAUSE OF ACTION

(ON BEHALF OF DANNY-KEATING TRAYNOR INDIVIDUALLY)

25. Plaintiff incorporates by reference all of the allegations, averments and matters contained in paragraph 1 through 6 and 22-24 inclusive as if set forth at length herein *in haec verba*.

SIXTH CAUSE OF ACTION

(ON BEHALF OF DANNY KEATING-TRAYNOR INDIVIDUALLY)

(FAILURE TO PAY WAGES DUE)

26. Plaintiff incorporates herein all of the allegations, averments and matters contained in paragraphs 1- 3 above as if set forth at length *in have verba*.

27. Plaintiff worked as a trainee for approximately 80 hours for which he was not paid. He is entitled to at least minimum wage plus any overtime for those hours.

WHEREFORE PLAINTIFFS PRAY JUDGMENT AS FOLLOW:

ON ALL CAUSES OF ACTION:

1. General damages according to proof
2. Special damages according to proof;
3. Interest on all sums awarded;
4. Costs of suit;
5. Such other, and/or further relief as is just and proper.

////

////

FIRST AMENDED COMPLAINT FOR RESTITUTION, DAMAGES AND INJUNCTIVE RELIEF

1 **ON THE FOURTH AND FIFTH CAUSE OF ACTION:**

2 6.. An Injunction preventing Defendant from engaging in the practices complained of in these
3 causes of action.
4

5
6 Dated: August 30, 2007

7 
8 **DANIEL BERKO**

9 Attorney for Plaintiff DANNY TRAYNOR-
10 KEATING on behalf of himself
11 and all those similarly situated
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

KEATING v AC SQUARE
SM SUP CT: 464144

PROOF OF SERVICE

I, the undersigned, hereby declare that I am over the age of 18 years, and not a party to the within entitled action. My business address is 819 Eddy Street, San Francisco, CA. 94109. On the date indicated below, I served a true copy of the following document:

PLAINTIFF DANIEL KEATING-TRAYNOR'S FIRST AMENDED COMPLAINT

upon the following at the address(es) stated below:

**RONALD ALLEN PETERS
LITTLER MENDELSON
50 W SAN FERNANDO ST 14FL
SAN JOSE, CA 95113-2431**

☒ **BY MAIL**, by depositing true and correct copies in sealed envelopes in the United States Mail in accordance with the usual mailing practice of this firm.

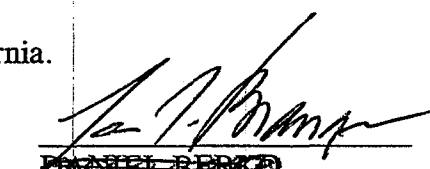
☐ **BY FAX**, by transmitting via facsimile the document(s) listed above to the fax number set forth below on this date before 5:00 p.m.

☐ **BY PERSONAL SERVICE**, By causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 31, 2007 at SAN FRANCISCO, California.


~~DANIEL BERTCO~~

JAN J. BRANGER

EXHIBIT C

ENDORSED FILED
SAN MATEO COUNTY

DEC 05 2007

Clerk of the Superior Court
By J. Obaob
DEPUTY CLERK

RONALD A. PETERS, Bar No. 169895
LILANTHII P. RAVISHANKAR, Bar No. 243487
LITTLER MENDELSON
A Professional Corporation
50 West San Fernando Street
14th Floor
San Jose, CA 95113.2303
Telephone: 408.998.4150
Facsimile: 408.288.5686
E-Mail: rpeters@littler.com

Attorneys for Defendant
AC SQUARE, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

DANIEL KEATING-TRAYNOR, on
behalf of himself and all others similarly
situated,

Plaintiff,

v.

AC SQUARE, DOES 1 THROUGH 600,
inclusive,

Defendant.

Case No. CIV 464144

**ANSWER OF DEFENDANT AC SQUARE
TO PLAINTIFF'S UNVERIFIED FIRST
AMENDED COMPLAINT**

BY FAX

Defendant AC SQUARE INC. ("Defendants") by their undersigned attorneys, hereby answer
the unverified First Amended Class Action Complaint of Plaintiffs as follows:

GENERAL DENIAL

Pursuant to California Code of Civil Procedure Section 431.30. Defendants generally and
specifically deny each and every allegation contained in each paragraph of the First Amended Class
Action Complaint and that they, or any of them, caused any damage or loss allegedly suffered by
Plaintiffs or any member of the putative class or members of the general public. Defendants further
generally and specifically deny (1) that Plaintiffs are entitled to the relief requested. (2) that Plaintiffs
have been or will be injured or damaged in any sum, or at all, by reason of any act or omission on the
part of Defendants, or any of its past or present agents, representatives, or employees, acting in the

Firmwide: 83766306.1 (47098.1008)

ANSWER OF DEFENDANT TO FIRST AMENDED COMPLAINT

LITTLER MENDELSON
A Professional Corporation
50 West San Fernando Street
14th Floor
San Jose, CA 95113.2303
Telephone: 408.998.4150
Facsimile: 408.288.5686
E-Mail: rpeters@littler.com

course and scope of their employment, or (3) that they are otherwise entitled to the relief requested in the First Amended Complaint in the amount stated, or in any greater or lesser amount, or at all.

AFFIRMATIVE DEFENSES

Pursuant to California Code of Civil Procedure Section 431.30, Defendants also assert each of the following affirmative defenses as to each purported cause of action of the First Amended Class Action Complaint.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The First Amended Class Action Complaint, and each and every purported cause of action contained therein, fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(Statute of Limitations – California Labor Code)

Each and every Cause of Action is barred to the extent they exceed the applicable statute of limitations for asserted violations of the California Labor Code, including, but not limited to, Labor Code sections 203 and 1771.2; Code of Civil Procedures sections 338(a) and 340(a); Business and Professions Code section 7071.11(b)(3); and section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b).

THIRD AFFIRMATIVE DEFENSE

(Statute of Limitations – Business and Professions Code)

The First Cause of Action is barred to the extent it exceeds the applicable statute of limitations for asserted violation of the Business and Professions Code, including, but not limited to, Business and Professions Code sections 17203, 17208 and 7071.11(b)(3); Code of Civil Procedure sections 338(a), 339(1) and 340(a); Labor Code sections 203 and 1771.2.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

Plaintiffs and those similarly situated, if any, have failed to mitigate their damages and, to the extent of such failure, any damages awarded should be reduced accordingly.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is barred in whole or in part by the doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

(Waiver)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is barred in whole or in part by the doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE

(Estoppel)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is barred in whole or in part by the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

(Consent and Acquiescence)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is barred in whole or in part to the extent Plaintiffs consented to and acquiesced in any alleged activity or conduct.

NINTH AFFIRMATIVE DEFENSE

(Laches)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is barred in whole or in part by the doctrine of laches.

TENTH AFFIRMATIVE DEFENSE

(Ratification)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is barred by the conduct, actions, and inactions of Plaintiffs, and each of them, under the doctrine of ratification.

///

///

ELEVENTH AFFIRMATIVE DEFENSE

(Avoidable Consequences)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is barred in whole or in part by the doctrine of avoidable consequences.

TWELFTH AFFIRMATIVE DEFENSE

(Class Action Not Superior)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, it is not superior to other methods of resolving the alleged claims raised by the First Amended Class Action Complaint.

THIRTEENTH AFFIRMATIVE DEFENSE

(Inadequate Representation)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, Plaintiffs are an inadequate representative of the purported class.

FOURTEENTH AFFIRMATIVE DEFENSE

(No Ascertainable Class)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, the class they purport to represent is not sufficiently ascertainable.

FIFTEENTH AFFIRMATIVE DEFENSE

(No Commonality of Claims)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, Plaintiffs cannot establish commonality of claims.

SIXTEENTH AFFIRMATIVE DEFENSE

(No Typicality of Claims)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, the claims Plaintiffs

purport to pursue are not typical of the potential claims of the other members of the purported class.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Common Issues Do Not Predominate)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, the individualized nature of Plaintiffs' claims makes class treatment inappropriate.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Insufficient Community of Interest)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, there is an insufficient well-defined community of interest in questions of law and fact.

NINETEENTH AFFIRMATIVE DEFENSE

(Individual Interests Conflict)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, their individual interests conflict with those of the other class members.

TWENTIETH AFFIRMATIVE DEFENSE

(Lack of Numerosity)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is not proper for treatment as a class action because, among other reasons, Plaintiffs cannot establish the numerosity required to maintain this action as a class action.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Lack of Standing)

Plaintiffs cannot maintain this action, nor any of the claims contained in the First Amended Class Action Complaint on the grounds that they lack standing to do so.

///

///

///

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Lack of Justiciable Controversy)

The First Amended Class Action Complaint, and each purported cause of action contained therein, fails as there exists no justiciable controversy to be determined.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Lack of Jurisdiction)

The Court has no jurisdiction over the subject matter of the First Amended Class Action Complaint, or parts thereof, because Plaintiffs have failed to exhaust their administrative remedies.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(De Minimis Damages)

The First Amended Class Action Complaint, and each purported cause of action contained therein, is barred in whole or in part by the *de minimis* doctrine.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Due Process Violation)

Plaintiffs' purported cause of action for violation of California Business and Professions Code Section 17200 *et seq.* is barred because provisions of Section 17200 *et seq.* violate the Due Process clause of the United States Constitution.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Conduct Not Unlawful)

Defendants' practice is and was not "unlawful" within the meaning of Business and Professions Code section 17200. Defendants' business practices have been at all times in compliance with applicable State and Federal law.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Conduct Not Unfair)

Defendants' practice is and was not "unfair" within the meaning of Business and Professions Code section 17200. Defendants' business practices have been at all times in compliance with applicable State and Federal law.

///

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Conduct Not Fraudulent)

Defendants' practice is and was not "fraudulent" within the meaning of Business and Professions Code section 17200. Defendants' business practices have been at all times in compliance with applicable State and Federal law.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Conduct Not Likely to Mislead Public)

Defendants' practice is and was not likely to mislead the public within the meaning of Business and Professions Code section 17200. Defendants' business practices have been at all times in compliance with applicable State and Federal law.

THIRTIETH AFFIRMATIVE DEFENSE

(Absence of Intent)

Plaintiffs' claims are barred by the absence of intent on the part of the Defendants to engage in the conduct alleged to be in violation of State laws.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Lack of Causation)

No act or omission on the part of the Defendants caused in fact, or proximately caused, the harm alleged to have been suffered by Plaintiffs or members of the general public.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Due Process Violation)

Plaintiffs' Class Action Complaint is barred in whole or in part by the due process clause of the United States and California Constitutions in that it seeks monetary relief on behalf of absent parties.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Due Process Violation)

Plaintiffs' application of the California Unfair Competition Law here violates constitutional due process because it cannot reasonably be determined what conduct is required or proscribed by the Unfair Competition Law.

1 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

2 **(Due Process Violation)**

3 Plaintiffs' claims on behalf of the general public violate Defendants' due process rights to the
4 extent the general public will not be bound by the outcome of this proceeding.

5 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

6 **(No Threat of Immediate Harm)**

7 No threat of immediate harm exists sufficient to support Plaintiffs' request for injunctive
8 relief.

9 **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

10 **(Adequate Legal Remedy Available)**

11 Plaintiffs' causes of action, and each of them, and their injunctive remedies, are barred in
12 light of the fact that Plaintiffs and the members of the general public have an adequate remedy for the
13 wrongs alleged.

14 **THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

15 **(Release of Claims)**

16 To the extent alleged members of the putative class and/or representative action have signed
17 a release encompassing claims alleged in the First Amended Class Action Complaint, their claims are
18 barred by that release.

19 **THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

20 **(Recovery of Civil Penalties Unconstitutional)**

21 Although Defendants deny that they have committed or have responsibility for any act that
22 could support the recovery of civil penalties in this lawsuit, if and to the extent any such act or
23 responsibility is found, recovery of civil penalties against Defendants is unconstitutional under
24 numerous provisions of the United States Constitution and the California Constitution, including the
25 excessive fines clause of the Eighth Amendment, the due process clause of the Fifth Amendment and
26 Section 1 of the Fourteenth Amendment, the self-incrimination clause of the Fifth Amendment, and

27 ///

28 ///

1 other provisions of the United States Constitution, and the excessive fines clause of Section 17 of
 2 Article I, the due process clause of Section 7 of Article I, the self-incrimination clause of Section 15 of
 3 Article I, and other provisions of the California Constitution.

4 **THIRTY-NINTH AFFIRMATIVE DEFENSE**

5 **(Due Process Violation)**

6 Imposition of exemplary or punitive damages under the facts and circumstances of this action
 7 violates Defendants' rights to procedural due process under the Fourteenth Amendment to the United
 8 States Constitution, and the Constitution of the State of California.

9 **FORTIETH AFFIRMATIVE DEFENSE**

10 **(Due Process Violation)**

11 The claim of Plaintiffs for exemplary or punitive damages against Defendants cannot be
 12 sustained, because an award of exemplary or punitive damages under California law without proof of
 13 every element beyond a reasonable doubt would violate Defendants' due process rights under the
 14 Fourteenth Amendment to the United States Constitution, and by analogous provisions of the
 15 California Constitution. Alternatively, unless Defendants' liability for exemplary or punitive damages
 16 and the appropriate amount of exemplary or punitive damages are required to be established by clear,
 17 and convincing evidence, any award of exemplary or punitive damages would violate Defendants' due
 18 process rights guaranteed by the Fourteenth Amendment of the United States Constitution, and by
 19 analogous provisions of the California Constitution.

20 **FORTY-FIRST AFFIRMATIVE DEFENSE**

21 **(Due Process Violation)**

22 The claim of Plaintiffs for exemplary or punitive damages against Defendants cannot be
 23 sustained because an award of exemplary or punitive damages under California law that is not subject
 24 to a definite and reasonable predetermined maximum limit that a jury may impose would violate
 25 Defendants' due process rights guaranteed by the Fourteenth Amendment to the United States
 26 Constitution, and by analogous provisions of the California Constitution.

27 ///

28 ///

FORTY-SECOND AFFIRMATIVE DEFENSE**(Due Process and Equal Protection Violations)**

The claim of Plaintiffs for exemplary or punitive damages against Defendants cannot be sustained, because an award of exemplary or punitive damages under California law by a jury that (1) is not provided a standard of sufficient clarity for determining the appropriateness, or the appropriate size, of a exemplary or punitive damages award, (2) is not adequately instructed on the limits on exemplary or punitive damages imposed by the applicable principles of deterrence and punishment, (3) is not expressly prohibited from awarding exemplary or punitive damages, in whole or in part, on the basis of invidiously discriminatory characteristics, including the corporate status of Defendants, (4) is permitted to award exemplary or punitive damages under a standard for determining liability for exemplary or punitive damages that is vague and arbitrary and does not define with sufficient clarity the conduct or mental state that makes exemplary or punitive damages permissible, and (5) is not subject to adequate judicial review for reasonableness and furtherance of legitimate purposes on the basis of objective standards, would violate Defendants' due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and the double jeopardy clauses of the Fifth Amendment as incorporated into the Fourteenth Amendment, and by analogous provisions of the California Constitution.

FORTY-THIRD AFFIRMATIVE DEFENSE**(Due Process Violation)**

The claim of Plaintiffs for exemplary or punitive damages against Defendants cannot be sustained, because an award of exemplary or punitive damages under California law for the purpose of compensating Plaintiffs for elements of damage not otherwise recognized by California law would violate Defendants' due process rights guaranteed by the Fourteenth Amendment to the United States Constitution, and by analogous provisions of the California Constitution.

FORTY-FOURTH AFFIRMATIVE DEFENSE**(Constitutional Violations)**

The claim of Plaintiffs for exemplary or punitive damages cannot be sustained because an award of exemplary or punitive damages under California law without the same protections that are

1 accorded to all penal defendants, including protection against unreasonable searches and seizures,
 2 double jeopardy and self incrimination and the rights to confront adverse witnesses, a speedy trial and
 3 the effective assistance of counsel would violate Defendants' rights under the Fourteenth Amendment
 4 to the United States Constitution and the Fourth, Fifth, and Sixth Amendments as incorporated into the
 5 Fourteenth Amendment, and Defendants' rights under analogous provisions of the California
 6 Constitution.

7 **FORTY-FIFTH AFFIRMATIVE DEFENSE**

8 **(Due Process Violation)**

9 Any award of exemplary or punitive damages against Defendants under the circumstances of
 10 this case would violate Defendants' due process rights guaranteed by the Fourteenth Amendment to
 11 the United States Constitution and the Fourth, Fifth, Sixth and Eighth Amendments as incorporated
 12 into the Fourteenth Amendment, and by analogous provisions of the California Constitution, because
 13 the award would be an arbitrary and unreasonable deprivation of Defendants' property.

14 **FORTY-SIXTH AFFIRMATIVE DEFENSE**

15 **(Due Process Violation)**

16 Any award of exemplary or punitive damages against Defendants under the circumstances of
 17 this case would violate Defendants' due process rights guaranteed by the Fourteenth Amendment to
 18 the United States Constitution and the Fourth, Fifth, Sixth and Eighth Amendments as incorporated
 19 into the Fourteenth Amendment, and by analogous provisions of the California Constitution, because
 20 Defendants were not given fair notice as to what conduct may subject them to punishment due to the
 21 impermissibly vague, imprecise and inconsistent California state law regarding the award of
 22 exemplary or punitive damages and due to the vagueness of the Unruh Act and statutes sued upon.

23 **FORTY-SEVENTH AFFIRMATIVE DEFENSE**

24 **(Unconstitutional Excessive Fine)**

25 Any award of exemplary or punitive damages would violate Defendants' constitutional rights
 26 under the excessive fines clause in the Eighth Amendment to the United States Constitution as

27 ///

28 ///

1 incorporated into the Fourteenth Amendment, and analogous provisions of the California Constitution.

2 **FORTY-EIGHTH AFFIRMATIVE DEFENSE**

3 **(Constitutional Violations)**

4 The First Amended Class Action Complaint, and each purported cause of action contained
5 therein, is barred in whole or in part because any damages, including but not limited to punitive
6 damages, would be contrary to the Constitution, common law and public policies in California, and/or
7 applicable statutes and court rules.

8 **FORTY-NINTH AFFIRMATIVE DEFENSE**

9 **(Unavailability of Retroactive Relief)**

10 The First Amended Class Action Complaint, and each purported cause of action contained
11 therein, is barred in whole or in part because any retroactive relief would violate the California
12 Constitution and principles of equity, and would be contrary to considerations of fairness and public
13 policy.

14 **FIFTIETH AFFIRMATIVE DEFENSE**

15 **(Additional Affirmative Defenses)**

16 Defendants presently have insufficient knowledge or information upon which they can form
17 a belief as to whether they may have additional, as yet unknown and unstated, affirmative defenses.
18 Defendants reserve the right to amend their answer to assert such additional affirmative defenses in the
19 event that discovery indicates that additional affirmative defenses are appropriate.

20 WHEREFORE, Defendants pray for judgment against Plaintiffs on the Class Action
21 Complaint as follows:

22 1. That Plaintiffs take nothing by reason of their First Amended Class Action
23 Complaint;

24 2. That the First Amended Class Action Complaint be dismissed in its entirety with
25 prejudice, and that judgment be entered for Defendants and against Plaintiffs;

26 ///

27 ///

28 ///

3. That Defendants be awarded its reasonable costs and attorneys' fees; and For such other and further relief as the Court deems just and proper.

Dated: December 5, 2007

~~RONALD A. PETERS
LILANTHI P. RAVISHANKAR
LITTLER MENDELSON
A Professional Corporation
Attorneys for Defendant
AC SQUARE, INC.~~